

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

FILED
JAMES J. WALDRON, CLERK

April 1, 2009

U.S. BANKRUPTCY COURT
NEWARK, N.J.
BY: /s/Diana Reaves, Deputy

IN RE:

Mac and Maryse Mac Truong,

Debtor.

CHAPTER

CASE NO.: 03-40283 (NLW)

Before: HON. NOVALYN L. WINFIELD

A P P E A R A N C E S :

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Before the court is an application to proceed *in forma pauperis* on an appeal of this court's October 16, 2008 order denying the Debtors' request to amend certain property exemptions. As set forth below, the court denies the application to proceed *in forma pauperis*.

JURISDICTION

The following constitutes the bankruptcy court's findings of fact and conclusions of law as required by the Federal Rule of Bankruptcy Procedure 7052. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B). The court has jurisdiction to determine this matter under 28 U.S.C. § 1334 and the Standing Order of Reference issued by the United States District Court for the District of New Jersey on July 23, 1984.

STATEMENT OF FACTS

Mac Truong and Maryse MacTruong ("Truongs") filed a joint petition under Chapter 7 of the Bankruptcy Code on September 23, 2003 ("Petition Date"). Steven P. Kartzman ("Trustee") was appointed as the trustee to administer their case. On October 22, 2008, Mac Truong filed a notice of appeal of this court's decision which denied the Truong's request to amend certain property exemptions. Mr. Truong's notice of appeal was accompanied by an application to proceed *in forma pauperis* ("IFP Application"). Mr. Truong utilized Form AO240 which contains a series of questions to be answered by the applicant. In particular, Mr. Truong failed to fully answer question 2(b). Question 2(b) required Mr. Truong to disclose his date of last employment and the amount of his take home salary or wages and pay period and the name and address of his last employer. Because

the IFP Application was deficient, by a letter dated November 5, 2008 the court required Mr. Truong to submit an amended *in forma pauperis* application providing a complete answer to question 2(b) and a supplemental certification explaining how Mr. Truong's monthly living expenses are met, the purpose of Mr. Truong's business address and the nature of his tenancy at 325 Broadway, New York, NY and a description of whether Mr. or Mrs. Truong have any ownership interest in or are employed by IMDIT Pro Se Services. Finally, the court required Mr. Truong to bring his last filed tax return to the hearing for an *in camera* review. The hearing to consider the supplemental filings was scheduled for November 17, 2008 ("Hearing Date"). Prior to the Hearing Date, Mr. Truong submitted an amended *in forma pauperis* application ("Amended IFP Application") supplemented by his certification ("Truong Certification"). On the Hearing Date, Mr. Truong appeared and provided the court with the Truongs' 2007 joint income tax return. The only income reported was that of Ms. Truong. From its review of the tax return, the Court determined that Mrs. Truong's income was modest, but nevertheless higher than the \$25,000 annual income which in February 2007 the Truongs asserted was sufficient to fund a Chapter 13 plan.¹

The Amended IFP Application and Truong Certification provide additional information regarding Mr. Truong's former employment history and salary. In his certification Truong contends that the question regarding employment status is not applicable because "[he has] always been self-employed and there was no date of last employment or the amount of [his] take home salary or wages or pay period of the names and address of [his] last employer to supply." Truong Certification, ¶ 4.

¹In early 2007 the Truongs sought to convert their Chapter 7 case to a Chapter 13 case. This motion was denied in an opinion and order dated March 5, 2007. *In re Truong*, No. 03-40283, 2007 WL 708874 (Bankr. D.N.J. 2007) describes how the Truongs proposed to fund their Chapter 13 plan.

However, this answer is unresponsive to the purpose of the question which is plainly intended to elicit the source of an applicant's income. Mr. Truong should have simply indicated that he is self-employed and stated when he last received income from his self-employment. Due to his unresponsive answer, the court finds that Mr. Truong still has not fully disclosed his sources of income.

In response to the court's inquiry about the purpose of his office, Mr. Truong certifies that he needs his office "to continue [his] business as an attorney in international law², court interpreter, translator, writer, inventor, TV producer, litigator *pro se*, and emergency residence." Truong Certification, ¶ 7. Truong further certifies that he meets his living expenses from his own earnings of \$400 per month, his wife's income, withdrawals from joint IRA accounts, and loans from family members. Truong Certification, ¶ 5. Mr. Truong also certifies that Mrs. Truong does business under the name of IMDIT Pro Se Services which files immigration and matrimonial paperwork on behalf of her clients. Truong Certification, ¶ 8. In his IFP Application and Amended IFP Application, Mr. Truong indicates that as a sublessor each month he receives \$3,000 in rental income from subleasees which he then pays to his landlord. Mr. Truong also indicates that he has less than \$500 in his bank account.³ He lists additional assets comprised of \$4,000 in an individual retirement account, a 1996 Saturn and a 1996 Dodge, the title of which is in litigation.

Finally, in support of the IFP Application, Mr. Truong submitted copies of orders approving

²Mr. Truong fails to indicate that he has been disbarred from the practice of law. See, *In re Truong*, 800 N.Y.S.2d 12 (N.Y. App. Div. 2005).

³Mr. Truong indicates that he has "less than \$500 average" in his bank account. The court assumes that he intends "\$500 average" to mean that on average, or generally, he has less than \$500 in his bank account.

in forma pauperis applications from various courts. The court assumes he appended these orders as evidence that other courts have found his previous *in forma pauperis* applications sufficient.

DISCUSSION

This case predates the *in forma pauperis* relief enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). As a result of BAPCPA, 28 U.S.C. § 1930(f)(2) now states that the bankruptcy court may waive “other fees” prescribed under §§ 1930(b) and (c), which include appellate costs. However, § 1930(f)(2) is not effective for cases filed before October 17, 2005—the BAPCPA effective date. BAPCPA, Pub. Law 109-8 § 1501(b)(1), 119 Stat. at 216; *In re Blumeyer*, No. 4:06CV1681, 2007 WL 209917, at *1-2 (E.D.Mo., 2007). Because Mr. and Mrs. Truong’s bankruptcy case was filed in 2003, §1930(f)(2) is not applicable.

Instead the Truongs’ *in forma pauperis* application is governed by 28 U.S.C. § 1915, which states:

Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all such assets such prisoner possesses that the person is unable to pay such fees or give security therefor.

This section of the United States Code was designed to ensure that indigent litigants have meaningful access to the federal courts. *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 342-343 (1948). A litigant seeking *in forma pauperis* status must establish that he is unable to pay the costs of his suit. *Walker v. People Express Airlines, Inc.*, 886 F.2d 598, 601 (3d Cir. 1989). However, the ability to pay is not the only consideration. § 1915(e)(2)(B)(i) further provides that “the

court shall dismiss the case at any time if the court determines that the action or appeal is frivolous or malicious.”

In applying § 1915, the Third Circuit has explained that § 1915 involves the following two-step analysis:

First, the district court evaluates a litigant’s financial status and determines whether (s)he is eligible to proceed *in forma pauperis* under § 1915(a). Second, the court assesses the complaint under § 1915(d) to determine whether it is frivolous. *Sinwell v. Schapp*, 536 F.2d 15 (3d Cir. 1976) Likewise, when deciding a motion to proceed *in forma pauperis* on appeal, this court grants or denies *in forma pauperis* status based on economic criteria alone and then, if warranted, dismisses the appeal as frivolous pursuant to § 1915(d).⁴

Roman v. Jeffes, 904 F.2d 192, 194, n.1 (3d Cir. 1990)(citation omitted).

A. The Ability to Pay

The Third Circuit has held that “in order for a court to grant *in forma pauperis* status, the litigant seeking such status must establish that he is unable to pay the costs of his suit” and that “[i]n determining the availability of partial *in forma pauperis*, a litigant’s ability must be assessed in light of the magnitude of the proposed expenditure.” *Walker v. People Exp. Airlines, Inc.*, 886 F.2d 598, 601 (3d Cir. 1989). Though not a bankruptcy case, *Walker* is helpful for assessing Mr Truong's *in forma pauperis* application. In *Walker*, the Third Circuit determined that a litigant could be granted partial *in forma pauperis* status if he demonstrated that he could not entirely fund the costs attendant to perfecting an appeal. *Id.* at 601. However, the Court also concluded “that courts must be rigorous in their examination of applications . . . to ensure that the treasury is not unduly imposed upon.” *Id.*

⁴Revisions to 28 U.S.C. § 1915 on April 26, 1996 redesignated § 1915(d) as § 1915(e).

Accordingly, it held that a court must assess a litigant's ability to pay "in light of the magnitude of the proposed expenditure." *Id.* From Its examination of Mr. Walker's financial affidavit, the Court determined that his financial circumstances precluded both complete and partial *in forma pauperis* status. It considered that Walker's financial affidavit revealed two notes totaling \$50,000, that he had only \$42.00 in cash and that he had no real estate, automobile or savings. However, the Court also pointed out that Walker's affidavit revealed a weekly salary of \$900.00. *Id.* Further, it estimated that the cost of obtaining a trial transcript (the basis for Mr. Walker's request) would not exceed \$3,360.00. *Id.* at 602. Thus, after weighing Mr. Walker's expenses against his income, the Third Circuit found that the costs of the appeal were well within Mr Walker's means. *Id.*

As in Walker, the Truong's financial resources are such that it would be inappropriate to grant them either complete or partial *in forma pauperis* status. Like Mr. Walker, the Truongs have a regular income. Further, the joint income tax return shows income greater than the \$25,000 annual income which they contended in a 2007 motion was sufficient to support a Chapter 13 plan. In fact, in their motion to convert their Chapter 7 case to a Chapter 13 case, the Truongs stated "we are presently not at all insolvent and are quite capable of paying our undisputed debts." *In re Truong*, No. 03-40283, 2007 WL 708874, at *1 (Bankr. D.N.J. 2007). Moreover, the costs of this appeal are nominal and certainly less than those faced by Mr. Walker. At most, the Truongs will be required to pay the \$255 filing fee and perhaps some photocopying costs for the documents that comprise the record on appeal. Even if the hearing transcript is required, the hearing was short and the cost of the transcript will not be significant. In sum, none of the costs of this appeal are burdensome given the assets and income available to the Truongs.

The decision to grant *in forma pauperis* relief is typically decided on a case-by case basis and

courts have routinely examined various factors in determining the applicant's financial picture. In fact, "no definitive standards have been developed by any court or commentator" in determining *in forma pauperis* status; rather, courts "should attempt to analyze the applicant's entire financial picture in determining whether to allow [*in forma pauperis*] status." *In re Koren*, 176 B.R. 740, 742 (Bankr. E.D.Pa. 1995). In *Koren*, the court ultimately determined that the debtor who was suffering from Alzheimer's disease, was eligible for *in forma pauperis* relief because his sole source of income was Social Security benefits, his expenses exceeded his income and his only assets were home furnishings. *Id.* at 746.

The First Circuit Bankruptcy Appellate Panel found financial hardship where the debtor's affidavit indicated that she and her husband had a negative cash flow of \$200 per month. *In re Heghmann*, 324 B.R. 415, 420 (1st Cir.B.A.P. 2005)(ultimately rejecting the debtor's application after finding the application to be without good faith). In *In re Melendez*, 153 B.R. 386 (Bankr. D.Conn. 1993), the court granted a creditor's *in forma pauperis* application after determining that the creditor received "a monthly payment of \$683 under the Aid to Families with Dependent Children program and \$210 per month in food stamps, yet, her modest monthly expenses exceeded her monthly income by several dollars." *Id.* at 390.

Unlike the cases just discussed, the Truong IFP Application does not demonstrate an absence of sufficient financial resources to meet the cost of an appeal. Instead, the record before the court demonstrates that the Truongs' joint income will easily permit the payment of the costs associated with this appeal. In this regard, the court rejects Mr. Truong's contention that Mrs. Truong's income should not be counted because he has filed the appeal solely in his name. The case is a joint case, and throughout the case all relief has been jointly requested. Even assuming that Mrs. Truong does

not support this appeal, it is evident that her income provides most of the support for both debtors and it is appropriate to take that into account in assessing Mr. Truong's financial resources.

Finally, the Truong Certification demonstrates that Mr. Truong is employable. In particular Mr. Truong's choice to pursue a career as a *pro se* litigator, rather than a profession that yields an income is no reason to grant the IFP Application. The Truong Certification reveals that he is capable of being gainfully employed. It lists a myriad of professions in which Mr. Truong is involved including being a *pro se* litigator. The tenacity and diligence which Mr. Truong has applied to his efforts as a self-styled "*pro se*" litigator are the same attributes that can be devoted to gainful employment. Indeed, he could assist his wife in her business. Alternatively, perhaps if Mr. Truong dedicated more of his time to one of the many other professions listed in the Truong Certification or sought other employment, he would not need *in forma pauperis* relief. See *In re Fromal*, 151 B.R. 733, 735 (E.D. Va. 1993)(in denying debtor's application to appeal *in forma pauperis*, the court noted that there was no reason why the debtor could not obtain gainful employment). For these reasons, Mr. Truong has not established the inability to pay his appellate costs and his IFP Application must be denied.

B. Frivolous Nature of the Appeal

The United States Supreme Court has stated that "a complaint . . . is frivolous where it lacks an arguable basis in either law or fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Equally, an appeal must be viewed as frivolous when it lacks an arguable basis in fact or law, There has been an unfortunate history of repetitive, vexatious and frivolous litigation by the Truongs in various

courts, including this one.⁵ The current appeal for which the Truongs request *in forma pauperis* status continues the pattern, as it too lacks a basis in the law.

In particular, in the matter presently under appeal, the Truongs filed an amendment to their Schedule C, adding a homestead exemption of \$250,000, citing Bankruptcy Code section 522(b)(2) as the basis for the amendment. The entirety of the court's opinion will not be repeated here. However, the following excerpt demonstrates the absence of legal basis for the instant appeal:

The Truongs' exemption claim for the Property also fails because no federal or state law supports allowance of a homestead exemption in the amount of \$250,000. At the Petition date, the homestead exemption allowable under Code §522(d)(1) amounted to \$17,425 for each debtor. With regard to a homestead exemption, New Jersey law is even less generous, providing no exemption for a debtor's residence.

The Truongs base their \$250,000 exemption on Code §522(b). However, their reliance on §522(b) is misguided. Because the Truongs rely on §522(p) as well as §522(b)(2), the court presumes they are relying on the Bankruptcy Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection act of 2005 ("BAPCPA") §522(b)(2) and its pre-BAPCPA counterpart §522(b)(1) simply provide the state governments with the authority to "opt-out" of the federal exemptions. That is, both before and after BAPCPA, a state could choose to prohibit its citizens from selecting the exemptions provided in §522(d). As is readily apparent, §522(b)(2) does not set out any exemptions, much less a \$250,000 homestead exemption.

The Truongs appear to derive their \$250,000 homestead exemption from §522(p)(1), which limits a homestead exemption to \$125,000 if (i) under §522(b)(3)(a) the debtor elects the state exemption and (ii) acquired the property in the 1215 day period preceding the petition date. Two fundamental flaws exist with regard to the Truongs' reliance on §522(p)(1). First neither §522(b)(3)(A) nor §522(p) were made applicable to cases pending when BAPCPA was enacted or became effective. Under §1505 of BAPCPA §522(b)(3)(A) was made applicable to cases filed on or after October 17, 2005, and

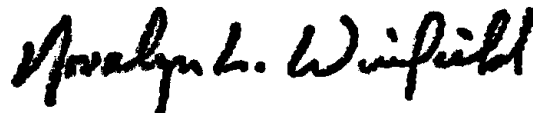
⁵Much of this litigation history is recounted in *In re Truong*, No. 03-40283, 2008 WL 442292 (Bankr. D.N.J. 2008).

§522(p) was made applicable to cases filed on or after April 20, 2005. Second, §522(p)(1) does not create an exemption, but rather places a cap on a state law exemption if the property was acquired within the 1215 day period preceding the petition date. *In re Kane*, 336 B.R. 477, 480-481 (Bankr. D. Nev. 2006).

In re Mac Truong and Maryse MacTruong, No. 03-40283, Docket #474, at *8-9 (Bankr. D.N.J. filed October 16, 2008). This complete misapplication of bankruptcy law by a former attorney is egregious. It is burdensome for the District Court to have to consider such appeals. In these circumstances the purpose of 28 U.S.C. § 1915 will not be met by liberally construing the ability to pay criteria in order to grant *in forma pauperis* status to the Truongs. Given the absence of any legal basis for this appeal, the *in forma pauperis* is frivolous under § 1915(e) and it should not be granted.

CONCLUSION

Because the Truongs have sufficient financial resources to pay the costs of their appeal, the request to proceed *in forma pauperis* is denied.



Dated:

JUDGE NOVALYN L. WINFIELD
United States Bankruptcy Judge